Supreme Court, U. S.
FILED
SEP 20 1976
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-29

COMPLETF AUTO TRANSIT, INC.,
Appellant,

vs.

CHARLES R. BRADY, JR., CHAIRMAN, MISSISSIPPI STATE TAX COMMISSION,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI

REPLY TO MOTION TO DISMISS OR AFFIRM

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The undisputed facts and the law justifying this Court's review of the decision from which this appeal is taken are fully set forth in the Jurisdictional Statement, and we shall not repeat them here. There are, however, certain assertions in the Motion to Dismiss or Affirm that might well be misleading. Consequently, we shall briefly reply to that Motion.

I.

First, appellee asserts that the transportation involved was intrastate in nature. With deference, we firmly submit that the Mississippi Supreme Court did *not* hold that the transportation involved in this case was intrastate in nature. We further submit that if it did so hold, such holding was manifestly incorrect.

Any fair and unstrained reading of the decisions of the trial court and the Mississippi Supreme Court clearly shows that both courts held that, *notwithstanding the fact that the transportation was interstate commerce,* the State could levy a privilege tax thereon so long as no other state could duplicate the tax involved and thereby impose cumulative burdens (J.S. A7). As shown in the Jurisdictional Statement, and as discussed more fully in Point II below, that conclusion is manifestly erroneous and in direct conflict with the prior decisions of this Court (J.S. 8-11).

Plainly and simply put, it is firmly established that a state cannot levy a tax on the *privilege* of engaging in exclusively interstate commerce, no matter how fairly the tax is apportioned to the activities conducted within a state, and regardless of the fact that no other state can duplicate the privilege tax.

State taxes *other than* privilege taxes may be imposed on interstate commerce, provided they do not constitute an undue burden and are non-discriminatory. However, a state privilege tax is an impermissible *direct* burden on, and a forbidden regulation of, interstate commerce itself, since the *privilege* of doing an interstate business is not "subject to the sovereign power of the state." *Spector Motor Service, Inc.* v. *O'Connor,* 340 U.S. 602, 609 (1951). Therefore, the constitutional infirmity of a *privilege* tax persists even if the tax is non-discriminatory. *Id.,* at 608-609.

If, however, we are mistaken in our reading of the holding below, and if the Mississippi Supreme Court did hold that the transportation was intrastate commerce, then we firmly submit that such holding was not only wrong but also provides no support whatsoever for the Motion. The question of what is or what is not interstate commerce is a federal constitutional question that must be determined

by the federal courts in the exercise of their own independent judgment. Consequently, there is a total lack of merit in the appellee's argument (Motion, p. 1) that the asserted holding (that the transportation was intrastate) causes the decision to rest on "an adequate non-federal basis." *Memphis Steam Laundry* v. *Stone,* 342 U.S. 389, 392 (1951); and cases collected in 21 C.J.S., *Courts,* §206, pp. 269-270 n. 38.

Furthermore, if the Mississippi Supreme Court did hold that the transportation was intrastate in character, that holding is patently wrong. The *facts* are not in dispute (J.S. A8). It is undisputed that the vehicles in question were shipped from outside of the State of Mississippi and, from the inception of the movement, were consigned to specific dealers in Mississippi and other states. Thus there can be no question that the transportation was interstate commerce. "Importation into one state from another is the indispensable element—the test—of interstate commerce." *United States* v. *Hill,* 248 U.S. 420, 424 (1918).

The mere fact that there was a change in the *mode* of transportation (from rail to truck) does not affect or diminish the essential interstate character of the transportation. Likewise, the fact that the movement *by truck* was wholly within Mississippi is irrelevant. In addition, the fact that additional shipping documents were necessitated by the change in the mode of transportation is wholly irrelevant. The important fact is that the transportation was a continuous, prearranged movement from a point in one state to various points in other states; as such, the essential character of the transportation was, and at all times remained, interstate commerce.

The foregoing principles are abundantly supported by both reason and precedent. Explicitly basing its holding on the decisions of this Court, the Mississippi Supreme Court has heretofore held that every part or link of a con-

tinuous passage from a point in one state to a point in another state is interstate commerce, even though a particular part of the carriage is entirely within the limits of one state, and even though the carriers are separate and independent, with no joint traffic arrangement. *American Express Company* v. *Miller,* 104 Miss. 247, 249-250, 61 So. 306, 307 (1913). See also *United States* v. *Yellow Cab Company,* 332 U.S. 218, 228-229 (1946).

Likewise, the continuity and the interstate character of an interstate shipment are not affected by changes in, or by the form of, the bills of lading, or by changes in the method or means of transportation. *Minnesota* v. *Blasius,* 290 U.S. 1, 9-10 (1933).

Appellee's argument based on the asserted existence of "local activity" is likewise devoid of merit. Under established precedents, local incidents such as gathering up, putting down, or interchanging interstate commodities, "as an integral part of their interstate movement are not adequate grounds for a state . . . privilege . . . tax." *Railway Express, Inc.* v. *Virginia,* 347 U.S. 359, 368 (1954). More important, however, there is no indication in the opinions of the courts below that this tax was in fact imposed on any such "local incident," and there is no language in the statute (set out at J.S., p. 3) that authorizes the imposition of this tax on any such "local incident." Thus, this argument is no more than a belated attempt by the Tax Commission to rewrite the statute, as well as the opinions of the two courts below, to find a constitutionally-acceptable basis for the imposition of this tax.

For the foregoing reasons, and for the reasons set forth in the Jurisdictional Statement, we respectfully submit that there is no merit whatsoever in the argument set forth in Point I of the Motion.

II.

In Point II of the Motion, appellee argues that, even conceding that the transportation in question was interstate commerce, the tax was valid because it "did not place an undue burden on interstate commerce." We submit that this argument is completely wide of the mark.

As previously shown, the question in this case is not whether the tax placed an undue burden on interstate commerce or whether it discriminated against interstate commerce. The important and controlling fact is that this was a *privilege* tax on the privilege of engaging in exclusively interstate commerce.

This Court has consistently held that such a *privilege* tax cannot constitutionally be imposed, regardless of whether it "unduly burdens" interstate commerce, regardless of whether it "discriminates" against interstate commerce, and regardless of whether the income which is the measure of the tax is fairly apportioned to the state. These principles are firmly established by a host of cases, including *Spector, Railway Express, Inc., Colonial Pipeline* v. *Traigle,* 421 U.S. 100 (1975) (discussed fully at J.S. 8-11); and *Portland Cement Co.* v. *Minnesota,* 358 U.S. 450, 458, 463 n. 7 (1959).

Taxes imposed upon the privilege of carrying on interstate commerce, regardless of the amount of the tax, have uniformly been held obnoxious to the commerce clause on the ground that the privilege is given by the national government and not by the state government. This Court has said that "No state can compel a party, individual, or corporation to pay for the privilege of engaging in interstate commerce." *Atlantic and Pacific Tel. Co.* v. *Philadelphia,* 190 U.S. 160, 162 (1903). Similarly, "Any such excise burdens interstate commerce and is therefore

invalid, without regard to measure or amount." *Alpha Portland Cement Co.* v. *Massachusetts,* 268 U.S. 203, 217 (1925). Moreover, "the constitutional infirmity of such a tax persists, no matter how fairly it is apportioned to business done within the state", *Spector,* 340 U.S. at 609.

In stressing the difference between state "privilege" taxes and other state taxes, this Court has said:

> "[I]t is beyond dispute that a State may not lay a tax on the 'privilege' of engaging in interstate commerce
>
> * * *
>
> This Court has consistently held that the 'privilege' of engaging in interstate commerce cannot be granted or withheld by a State, and that the assertion of state power to tax the 'privilege' is, therefore, a forbidden attempt to 'regulate' interstate commerce."

Portland Cement Co. v. *Minnesota,* 358 U.S. 450, 458, 463 n. 7 (1959).

With due deference, appellee's whole argument seeks to ignore or gloss over the fact that the tax involved is a privilege tax on the doing of an exclusively interstate business. As such, its constitutional invalidity is clear.

III.

Finally, we note that the appellee has not taken issue with our assertion that this case presents an issue of national importance. As noted in the Jurisdictional Statement, this case is of major significance to all common and contract carriers transporting goods or passengers, as well as to other businesses of an interstate character.

If this appeal is dismissed, the decision of the Mississippi Supreme Court will invite other states to impose

privilege taxes on businesses of a purely interstate character. This decision, if not reversed, will in all probability produce a number of similar cases which this Court will ultimately have to resolve.

As an example of the "ripple effect" that this decision will create we need only point to the result of the decision of the Washington Supreme Court in *Convoy Company* v. *Taylor,* 334 P.2d 772 (Wash. 1959). Clearly, one of the alternative bases for the holding in *Convoy Company*—that a non-discriminatory privilege tax on exclusively interstate commerce is permissible—directly contradicts the holdings of this Court in *Spector, Railway Express, Inc.,* and *Colonial Pipeline.* Nevertheless, it was the erroneous holding in *Convoy Company* (which was not appealed to this Court), which led to the erroneous holding of the Mississippi Supreme Court in this case.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Motion should be denied, probable jurisdiction should be noted, and the judgment of the Mississippi Supreme Court summarily reversed.

Respectfully submitted,

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